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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1966~~ 1209

RAILROAD TRANSFER SERVICE, INC., A Delaware Corporation,

Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; RICHARD J. DALEY, NOT INDIVIDUALLY, BUT AS MAYOR OF THE CITY OF CHICAGO; RAYMOND F. SIMON, NOT INDIVIDUALLY, BUT AS CORPORATION COUNSEL OF THE CITY OF CHICAGO; ORLANDO WILSON, NOT INDIVIDUALLY, BUT AS SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO; and JAMES CARTER, NOT INDIVIDUALLY, BUT AS PUBLIC VEHICLE LICENSE COMMISSIONER OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 6

INDEX.

	PAGE
Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit	1
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	4
Statement of the Case	4
Jurisdiction of the District Court	7
Reasons for Granting the Writ	8
I. The Decision of the Court of Appeals Is in Conflict With Chicago v. Atchison, Topeka & Santa Fe Railway Company, 357 U. S. 77 (1958), and Other Applicable Decisions of This Court. The Dissenting Opinion Is in Accord With Applicable Law	8
A. In Respect to the Requirement That Petitioner Must Establish That It Is "Qualified to Pursue the Occupation of a . . . Coachman" in Order to Obtain a License	8
B. In Respect to Specific Provisions of the Ordinance	12
II. The Instant Action Is Appropriate and Is Not Premature, and the Contrary Holding of the Court of Appeals Is in Conflict with Decisions of this Court	15
Conclusion	17
Appendix	19
Railroad Transfer Service, Inc. v. City of Chicago, Decision of the United States Court of Appeals for the Seventh Circuit, July 20, 1964	19

Railroad Transfer Service, Inc. v. The City of Chicago, et al., Decision of the United States Court of Appeals, for the Seventh Circuit, March 10, 1966 23

Extracts From Chapter 28, "Public Passenger Vehicles," of the Municipal Code of Chicago .. 33

Section 202—Interstate Commerce Act 49 U. S. C. 302 36

Table of Authorities Cited.

Adams Express Co. v. New York, 232 U. S. 14, 32 (1914) 10, 14

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 529 14

Castle v. Hayes Freight Lines, Inc., 348 U. S. 61, 64 14

Chicago v. Atchison, Topeka and Santa Fe Ry. Co., 357 U. S. 77 (1958) ..... 4, et seq.

Continental Baking Co. v. Woodring, 286 U. S. 352 (1932) 12

Frost & Frost Trucking Co. v. Railroad Commission, 271 U. S. 583, 591 13

Harman v. Forssenius, 380 U. S. 528 (1965) 11

Lyons v. Illinois Greyhound Lines, 192 F. 2d 533-535 (7th Cir. 1951) 7

Peyton v. Railway Express Agency, Inc., 316 U. S. 350, 353 (1942) 7

Smith v. Cahoon, 283 U. S. 553 (1931) 12, 13

Toomer v. Witsell, 334 U. S. 385, 395-403, 407-409 (1948) 14

Statutes, Ordinances and Constitution of the United States.

Art. I, Sec. 8, United States Constitution 4

28 U. S. C. Sec. 1254 (1) 2

28 U. S. C. Sec. 1337 7

28 U. S. C. Sec. 2201 15

49 U. S. C. Sec. 302(c) 4

49 U. S. C. Sec. 302(c)(2) 14

Chapter 28, Municipal Code of Chicago, as Amended ..... 4 et seq.

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OCTOBER TERM, 1965.

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Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; RICHARD J. DALEY, NOT INDIVIDUALLY, BUT AS MAYOR OF THE CITY OF CHICAGO; RAYMOND F. SIMON, NOT INDIVIDUALLY, BUT AS CORPORATION COUNSEL OF THE CITY OF CHICAGO; ORLANDO WILSON, NOT INDIVIDUALLY, BUT AS SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO; and JAMES CARTER, NOT INDIVIDUALLY, BUT AS PUBLIC VEHICLE LICENSE COMMISSIONER OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Railroad Transfer Service, Inc., a Delaware Corporation, petitioner herein, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 10, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals for which review is sought, and the dissenting opinion, are reported in 358 F. 2d 55, 59, and are printed in the Appendix hereto, pp. 23, 31. The Court of Appeals affirmed a judgment of the United States District Court for the Northern District of Illinois.

There were two opinions by the District Court and one earlier opinion by the Court of Appeals. The first District Court opinion (R. 138-145), granting respondent's motion to dismiss the complaint, is not reported. The Court of Appeals vacated this judgment on the ground that, unknown to the District Court, the ordinance in issue had been amended in 1963 during the litigation and before the judgment was entered. The remand called for consideration of the effect of the amendment. 334 F. 2d 991 (1964), App. p. 19. The district Court's second opinion (R. 147-151), granting respondent's motion to dismiss petitioner's second amended complaint, is not reported.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered on March 10, 1966. Jurisdiction is conferred in this Court to review the judgment of the Court of Appeals by 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1.

Whether petitioner, a motor carrier engaged by contract with 21 railroads in transferring interstate passengers between railroad stations in Chicago under authority of the Interstate Commerce Act, and receiving its entire compensation from the railroads, may be compelled by a Chicago

ordinance to file *annually* an application for authority to perform the transfer service where granting the application is conditioned upon—

a. A finding by a City official after investigation "that the applicant is qualified to pursue the occupation of a . . . coachman," the word "coachman" including petitioner by definition, and the word "qualified" being by context not related to traffic safety;

b. Total compliance with the requirements of the ordinance.

2.

Whether Chicago may by the ordinance compel petitioner—

a. To file annually with the City a comprehensive and detailed statement of its expenses and earnings in performing its transfer contract, and its balance sheet;

b. To afford City officials access to its business and financial books and records;

c. To employ only residents of Chicago as drivers of its vehicles;

d. To maintain its principal place of business in Chicago.

3.

Whether the instant action for a declaratory judgment that the contested provisions of the ordinance are invalid, and for an injunction against their enforcement, is appropriate and not premature.

STATUTES INVOLVED.

Chapter 28 of the Municipal Code of Chicago, with amendments since 1955, is printed in full in the Record, pp. 21-47. Pertinent provisions are set forth in the Appendix hereto, pp. 33-35.

Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), 54 Stat. 920, 56 Stat. 300, is printed in the Appendix, pp. 36-37.

The Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."

STATEMENT OF THE CASE.

This action has its roots in the events that led to *Chicago* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77 (1958). For many years before 1955 the Chicago railroads employed Parmelee Transportation Company to carry passengers traveling through Chicago from their incoming to their outgoing railroad stations. During this period a licensing ordinance that regulated various classes of "public passenger vehicles" included and defined a "terminal vehicle" as one that is operated under contracts with railroads exclusively for the transfer of railroad passengers between terminal stations. In June, 1955, the railroads advised Parmelee that, effective October 1, 1955, they would discontinue their arrangements with Parmelee and would engage petitioner to perform the transfer service. In July, 1955, the Chicago City Council amended the ordinance so as to (1) eliminate the contract requirement from the definition of terminal vehicle and (2) compel any new applicant for a terminal vehicle license to prove to the City Public Vehicle License Commissioner that the new service was required by the public convenience and neces-

sity. See 357 U. S. at pp. 79-81. This Court held the amendment invalid because in conflict with the Interstate Commerce Act. *Id.* at p. 85.

Soon thereafter, beginning in 1959, the Chicago City Council renewed its harassment of petitioner by various amendments to the public passenger vehicle ordinance. The amendments repealed the requirement of proof of public convenience and necessity, but by new sections and additions to old sections they created new economic regulations aimed squarely at petitioner.

In 1959 an amendment to section 28-6 added to the ordinance as a condition to issuance of an annual license the requirement that the commissioner "shall find that the applicant is qualified to pursue the occupation of a cabman or coachman" (R. 29). This amendment is not related in context to traffic safety; instead it implements or is implemented by other post-1958 amendments providing economic regulation.

An amendment added in 1959, section 28-5.1 (R. 30), requires that all "corporate applicants for public passenger vehicle licenses shall . . . have their principal places of business in the City of Chicago."

In 1963 a section theretofore applicable only to taxicab operators, 28-30.1, was amended so as to cover "every . . . corporation", thus bringing petitioner within its terms. This section (R. 44) provides that every corporation shall keep accurate books of account at its Chicago office and shall annually on or before May 1 file with the Commissioner a profit and loss statement for the preceding calendar year showing in great detail its earnings and expenses, and its balance sheet at the end of the year. The Commissioner is granted access to the corporation's records "during normal business hours". As we have noted above, the first opinion of the Court of Appeals, 334 F. 2d

991, remanding to the District Court, called for consideration of the 1963 amendments.

The definition of "chauffeur" in section 28-1 of the ordinance (App. p. 33, R. 29) requires the construction that drivers of petitioner's vehicles must be residents of Chicago.

The 1959 amendments were made effective on January 1, 1960 (R. 32). On August 19, 1960, the Public Vehicle License Commissioner demanded that petitioner make application for licenses and comply with the ordinance. On August 26, 1960, petitioner made application for licenses for its vehicles under protest in order to protect its right to seek judicial relief. The City refused to accept an application with a protest and advised that unless the protest was withdrawn petitioner's vehicles would not be permitted to operate. Thereupon petitioner, conceiving itself faced with an emergency, paid the 1960 license fees and partially complied with the ordinance in other respects (R. 129-130, 72-75).

On September 23, 1960, petitioner commenced the instant action by filing its complaint in the District Court for declaratory judgment that the ordinance is in conflict with the Interstate Commerce Act and the Commerce Clause (R. 1). The case eventually went to final hearing on petitioner's second amended complaint for declaratory judgment and injunction (R. 5-50) and affidavit (R. 129-132), and respondent's motion to dismiss (R. 51-68) and affidavit (R. 70-116). License fees accruing annually were deposited by petitioner with the clerk of the District Court (R. 145-146).

JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction under 28 U. S. C. § 1337 to determine whether the provisions of the ordinance in issue are invalid because in conflict with the Interstate Commerce Act. *Peyton* v. *Railway Express Agency, Inc.*, 316 U. S. 350, 353 (1942): *Lyons* v. *Illinois Greyhound Lines*, 192 F. 2d 533-535 (7th Cir. 1951).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CHICAGO v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, 357 U. S. 77 (1958), AND OTHER APPLICABLE DECISIONS OF THIS COURT. THE DISSENTING OPINION IS IN ACCORD WITH APPLICABLE LAW.

A. In Respect to the Requirement That Petitioner Must Establish That It Is "Qualified to Pursue the Occupation of a . . . Coachman" in Order to Obtain a License.

After the decision in *Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77, holding invalid the requirement that petitioner must obtain a certificate of public convenience and necessity in order to perform the inter-station transfer service, the City amended the ordinance. The City repealed (R. 32, Sec. 6) the public convenience and necessity section struck down by this Court (Sec. 28-31.1; 357 U. S. at page 80) but at the same time amended section 28-6 in the same ordinance by adding a new requirement that petitioner must prove *annually* to the Commissioner of licenses that it is "qualified to pursue the occupation of a . . . coachman" before the license to transfer passengers between stations may be granted.

Thus, in 1958, at the time of the decision in *Atchison*, section 28-6 of the ordinance was the following (R. 22-23):

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the

financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year. [Passed. Coun. J. 12-20-51. p. 1596: amend. 4-16-52, p. 2178.]"

In 1959, as stated above, the City amended section 28-6 by striking out the last sentence and substituting therefor the following (R. 29, Sec. 2):

"If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed and that the applicant is qualified to pursue the occupation of a cabman or coachman, the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued."

It is plain that the amendment added nothing to section 28-6, or to any other section, that pertained to safety of operation and equipment. But it did add the requirement that the Commissioner is to consider *each year* whether "the applicant is *qualified to pursue the occupation* of a cabman or coachman" (emphasis supplied). This clause is phrased strictly in terms of economic regulation that cannot be applied by the city to interstate commerce. *Adams*

Express Co. v. *New York*, 232 U. S. 14, 32 (1914). The City is here, as in *Adams Express*, attempting to regulate the carrying on of an interstate business. The City is here, as in *Atchison, supra*, claiming "at least some power . . . to decide whether a motor carrier may transport passengers from one station to another". 357 U. S. at 85.

The setting in which this amendment was enacted emphasizes its meaning. Having been defeated in its effort to compel petitioner to prove public convenience and necessity, the City in an obvious and blatant effort to avoid the clear meaning of this Court's decision merely substituted therefor the requirement that petitioner prove that it is qualified before a license is issued.

Whether petitioner is qualified to operate as a carrier in interstate commerce transferring passengers between railroad stations under a contract with the railroads, pursuant to provisions of the Interstate Commerce Act, is the concern of the railroads and the Interstate Commerce Commission, not of the City of Chicago. Indeed, this Court has already stated in crystal clear language: "The Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities" (*Atchison, supra*, 357 U. S. at page 87).

In *Atchison* the Court said in respect to the public convenience and necessity requirement:

> "Although counsel for the City denies that it will use this power to exclude proposed transfer operations wholly or primarily because of economic considerations . . . it is clear that the City claims *at least some power* under § 28-31.1 to decide whether a motor carrier may transport passengers from one station to another" (357 U. S. at page 85). (Emphasis supplied.)

Later in the opinion the Court pointed out:

> "Of course the City retains considerable authority

to regulate how Transfer's vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly the City may require registration of those vehicles and exact reasonable fees for their use of the local streets" (page 88).

The City has not complied with the mandate of this Court to restrict its regulation to general safety matters and the exaction of reasonable fees for the use of its streets. Instead, it has continued to claim "at least some power" to determine whether petitioner has a right to operate even if it complies with general safety regulations and pays its license fees.* Once again, therefore, petitioner is required to seek relief from this Court.

Harman v. *Forssenius*, 380 U. S. 528 (1965), presents a similar case of die-hard effort to impair Constitutional rights. A state law required a voter who did not pay the outlawed poll tax to file in every election year a form which amounted to an application for the right to vote. Terming this a "cumbersome procedure" (pp. 541-542) designed to circumvent rights granted by the Twenty-fourth Amendment, the Court held it invalid. Similarly, a requirement that petitioner shall *every year* prove to the satisfaction of the City that it is "qualified to pursue the occupation" of transferring passengers is a "cumbersome procedure" that violates petitioner's rights under the Commerce Clause and the Interstate Commerce Act. Paraphrasing the Court's opinion (pp. 540-541): The Commerce Clause, like the Twenty-fourth Amendment, "nullifies sophisticated as well as simple-minded modes of impairing the right granted. . . . It hits onerous procedural requirements which effec-

* We are not aware of any ground for the statement of the Court of Appeals, 358 F. 2d at page 57, App. p. 25, footnote 2, that "Chicago now admits that it has no power to stop Transfer's operations in interstate commerce."

tively handicap exercise of" Federally granted rights (380 U. S. pp. 540-541).

The Court of Appeals relied exclusively upon *Continental Baking Co.* v. *Woodring*, 286 U. S. 352 (1932), and plainly erred in its application of that decision to the case at bar. The Court quoted extracts from pages 367-369 of *Continental Baking*, 358 F. 2d at 57-58, App. p. 27, but omitted part of page 368 which clearly distinguishes *Continental Baking* from this case. The Court of Appeals left out passages on page 368 in which this Court expressly distinguished *Continental Baking* from *Smith* v. *Cahoon*, 283 U. S. 553 (1931). In the case at bar, as in *Smith* v. *Cahoon*, petitioner is threatened with enforcement of the plain terms of a specific legislative enactment which cannot lawfully be applied to it, whereas in *Continental Baking* "the statute itself clearly distinguishes in fundamental matters between the obligations of public and private carriers" (p. 368). *Smith* v. *Cahoon* sustains petitioner here, and was relied upon by this Court in *Atchison, supra*, 357 U. S. at 89. Moreover, since *Continental Baking* was decided Congress has by section 202(c) of the Interstate Commerce Act, 49 U. S. C. 302(c), 54 Stat. 920, specifically "extend[ed] freedom from local restraints to the movement of interstate traffic between railroad terminals," 357 U. S. at 87-88.

B. In Respect to Specific Provisions of the Ordinance.

The Court of Appeals summarized part of its holding as follows:

> "While the ultimate aim of the Chicago ordinance is not clear, the ordinance does have an apparent relation to responsibility. To require transfer to maintain its office in Chicago, to have its drivers reside in Chicago, and to give proof of financial responsibility is but to establish accessible responsibility. Such requirements are reasonably within police powers of promotion of welfare." (App. p. 28, 358 F. 2d at 58).

In this the Court of Appeals was clearly in conflict with decisions of this Court. In respect to petitioner's specialized service, the contested provisions of the ordinance are properly characterized and condemned by *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 591 (1926):

> "[T]he act, as thus applied, is in no sense a regulation of the use of the public highways. *It is a regulation of the business of those who are engaged in using them.*" (Emphasis supplied.)

The City may not impose the requirement that petitioner shall file annually with the City a detailed statement of its expenses and earnings, and its balance sheet, and afford the City access to its books. These matters are not conceivably related to traffic safety or any other legitimate concern of the City. Here the City seeks to impose upon petitioner the same financial supervision that it exercises over public taxicabs whose rates and service are under the City's control. A similar assertion of power was condemned by this Court in *Smith* v. *Cahoon*, 283 U. S. 553, 563 (1931):

> "[T]he scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. . . . Such a scheme of regulation of the business of a private carrier . . . is manifestly beyond the power of the state."

Petitioner is indeed a private contract carrier, accepting only passengers having contracts for carriage with its principals, the railroads, and receiving compensation only from the railroads. Additionally petitioner and the railroads are subject to the exclusive jurisdiction of the Interstate Commerce Commission in respect to the financial matters which the City here seeks to supervise. 49 U. S. C. 302(c)(2); *Chicago* v. *A. T. & S. F. Ry. Co.*, 357 U. S. 77, 86-87.

The restriction that only residents of Chicago may be employed as chauffeurs is obviously unreasonable and unrelated to traffic safety, particularly in view of the fact that Chicago is closely packed in on three sides by numerous separate residential municipalities. Long ago this Court condemned a provision of an ordinance of the City of New York which had the practical effect of limiting drivers of express wagons to residents of that city. *Adams Express Co.* v. *New York*, 232 U. S. 14, 34 (1914):

> "When . . . the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome."

Likewise, petitioner, a Delaware corporation authorized to do business in Illinois, cannot lawfully be compelled to maintain its principal place of business in Chicago. Such a requirement obviously would have a ruinously splintering impact upon enterprises engaged in interstate commerce. The City may not regulate interstate commerce in this fashion. Compare *Toomer* v. *Witsell*, 334 U. S. 385, 395-403, and concurring opinion, 407-409 (1948). The requirements of this ordinance are clearly distinguishable from those where a State or municipality requires out of state carriers to maintain registered agents and sufficient insurance coverage.

In at least three recent landmark decisions* this Court, acknowledging the power of State and local governments to regulate interstate carriers as to general safety matters, has struck down local regulatory measures which do not deal with safety of the carrier's operations but instead merely harass, obstruct or impede its interstate operation. Petitioner does not challenge the right of the City of Chi-

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* *Chicago* v. *Atchison, Topeka & Santa Fe Railroad Company*, 357 U. S. 77; *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61, 64; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 529.

cago to require its vehicles to "obey traffic signals, speed limits and other general safety regulations" nor does it challenge the right of the City of Chicago to "exact reasonable fees for [its] use of the local streets." Petitioner has consistently obeyed all safety regulations and paid all fees exacted by the City and State for use of the streets.

This Court in *Atchison* clearly pointed out that the City has no power to regulate petitioner in respect to the matters in controversy when it said:

> "National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic" (357 U. S. at pages 87-88).

The total lack of relationship between the contested regulations and safety, and the inclusion of the elements of public convenience and necessity which petitioner must prove to establish that it is "qualified to pursue the occupation of a . . . coachman," make it clear that in this ordinance as amended the City has attempted to cancel the mandate of this Court in *Atchison*. That attempt should be struck down by the Court.

II.

THE INSTANT ACTION IS APPROPRIATE AND IS NOT PREMATURE, AND THE CONTRARY HOLDING OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The judgment of the Court of Appeals was the following: "No actual controversy has been presented to the District Court as required by 28 U. S. C. A. § 2201" (the declaratory judgment provision). 358 F. 2d at 59, App. p. 30. While the Court's reasons for this conclusion do not seem clear,

apparently the Court decided that the ordinance is not unequivocally invalid on its face and that petitioner must await until the ordinance is forcibly applied before seeking judicial relief. The Court apparently overlooked that petitioner has been advised by the City on *at least two occasions* that it must comply fully with all provisions of the ordinance or be barred from using the streets. (R. 129-131, 70, 132.) The Court conceded that "the ultimate aim of the ordinance is not clear," that "it is true that its relation to safety is not in all respects self-evident", and that "As it stands, the ordinance cannot be unequivocally classified and, until it is applied, it lacks the test whereby its real nature is revealed." 358 F. 2d at 58, App. pp. 28, 29.

The Court was plainly in error and its concessions emphasize its error. The ordinance is invalid on its face in the particulars set forth above, and petitioner is entitled to seek judicial relief without submitting to the Commissioner *every year* the issue whether petitioner is "qualified to pursue the occupation" of transferring passengers, and to test the other questioned provisions. *Chicago* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77, 89.

Petitioner has the responsibility of transferring thousands of railroad passengers between Chicago stations every day and it must maintain an adequate fleet of specialized motor vehicles and a highly experienced staff. It cannot be subjected to the uncertainty every year as to whether a city official, representing an obviously unfriendly City Council, is going to certify that it is "qualified to pursue the occupation" of transferring passengers. It cannot be compelled to seek the City's grace in that respect. The fact that licenses were issued to petitioner in 1960 does not, under the specific terms of the ordinance, bind the City to issue them in subsequent years. *The uncertainty in that regard was deliberately created by the City.* No better case for declaratory relief could be imagined.

In *Atchison*, the City also argued that petitioner must await final action by it, before attacking the ordinance. This Court rejected that argument in *Atchison* and it should do so in the instant proceeding for the same reasons (357 U. S. at pages 84-85).

CONCLUSION.

Wherefore, petitioner prays that certiorari be granted to review the judgment below.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 14479 September Term, 1963 April Session, 1964

Railroad Transfer Service, Inc., a Delaware corporation,
Plaintiff-Appellant,
v.
City of Chicago, a municipal corporation; Richard J. Daley, Mayor; John C. Melaniphy, Corporation Counsel; Orlando Wilson, Superintendent of Police, and James Carter, Public Vehicle License Commissioner,
Defendants-Appellees.

Appeal from the United States District Court of the Northern District of Illinois, Eastern Division.

July 20, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On December 13, 1963, Railroad Transfer Service. Inc., a Delaware corporation, plaintiff, appealed from a judgment of the district court entered November 27, 1963 dismissing plaintiff's first amended complaint filed October 31, 1963, which prayed for a declaratory judgment that section 28-1, *et seq.* of the

municipal code of Chicago be held unconstitutional and void, and that the city and other defendants be enjoined from enforcing it against plaintiff.

The facts are not in dispute. Plaintiff has its principal place of business in the City of Chicago, and, under contracts with the railroads, which operate to and from Chicago rail terminals, it transports rail passengers and baggage between said terminals. Otherwise it does not operate as a for-hire carrier. All of the railroad terminals which are served by Transfer are located in the downtown area of Chicago.[1]

On August 24, 1959, defendant city by ordinance amended its existing § 28-1 of the municipal code relating to public passenger vehicles, and thereby expressly defined the term "Terminal Vehicle" in such a way as to describe plaintiff's service and imposed a specified annual license fee for each such vehicle. The ordinance also granted to the Public Vehicle License Commissioner of the city authority to determine the financial responsibility of the licensee, and whether vehicles are safe as well as comfortable, as well as other powers of supervision over plaintiff's vehicles. The ordinance also required that plaintiff maintain its principal office in the City of Chicago, that its drivers reside in that city and that the color of its vehicles be approved by the Commissioner.

Under date of September 15, 1961, the Commissioner by letter notified plaintiff that unless it applied for licenses for its vehicles by September 22, 1961, it was to cease operation until the ordinance had been fully complied with.

This litigation followed.

After plaintiff filed its brief in this court on March 17,

[1] This service is described in our earlier decision in *Atchison, Topeka & Santa Fe Railroad Company* v. *City of Chicago*, 240 F.2d 930 (1957), affirmed, 357 U.S. 77-88 (1958).

1964, defendants filed their brief here on May 6. 1964 and stated therein that the City of Chicago on July 1, 1963 amended the ordinance here involved so that § 28-15.1 now provides:

> In the event that the Commissioner [Public Vehicle License Commissioner] after investigation and hearing, shall determine that any licensee . . . shall fail to carry out any representation made to the Commissioner before the issuance of such license, or shall wilfully make any material misstatement of fact on any statement filed with the Commissioner, or if any . . . coachman [plaintiff is a coachman under section 28-1 (m) of said ordinance as amended July 1, 1963, p. 575 of said Council Proceedings] while in charge of a public passenger vehicle, as a chauffeur, shall operate any public passenger vehicle in violation of the provisions of this chapter or of the rules and regulations of the Commissioner relating to the administration and enforcement of the provisions of this chapter, the Commissioner may recommend to the Mayor that all public passenger vehicle licenses held by him be revoked and the Mayor, in his discretion, may revoke said licenses.

Theretofore said section read as follows:

> 28-15.1 *Discretionary Revocation of License.*) If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any cabman or coachman, while in charge of a public passenger vehicle as a chauffeur, shall operate any public passenger vehicle in violation of the provisions of this chapter or of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that all public passenger vehicle licenses held by him be revoked and the mayor, in his discretion, may revoke said licenses.

Plaintiff, when it filed its reply brief on June 1, 1964, stated that the reading of defendants' brief was the first time that plaintiff learned of this amendment of the ordinance. It contends with considerable logic that the date of this amendment to the ordinance was prior to the time that defendants filed a motion to strike the first amended complaint, which was November 21, 1963, "almost four months after the ordinance had been amended eliminating 'terminal vehicles' from its scope." Plaintiff points out that it was on November 27, 1963 that the court's final order was entered herein.

Plaintiff argues from these facts that the copy of the ordinance attached to defendants' motion to dismiss had been amended four months earlier and yet the defendants were silent about the "sweeping amendment". If so, it contends that the district court ruled without knowledge that the ordinance it was construing had been materially amended four months earlier; and that "terminal vehicles" had been removed from the ordinance. This amendment was disclosed to us for the first time in the defendants' brief filed in this Court. We express no opinion at this time as to this phase of the appeal.

In order that complete justice may be done in this case under these unusual circumstances, it is the order of this court that the judgment of the district court be vacated and this cause remanded to that court for further proceedings consistent with the facts now appearing in the record before us.

JUDGMENT VACATED AND CAUSE REMANDED WITH DIRECTIONS.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1965—January Session, 1966.

No. 15230
RAILROAD TRANSFER SERVICE, INC., a Delaware Corporation,
Plaintiff-Appellant,
v.
THE CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 10, 1966

Before HASTINGS, *Chief Judge*, and CASTLE and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* Railroad Transfer Service, Inc., has appealed from an order of the district court dismissing its second amended complaint for declaratory and injunctive relief against the City of Chicago, Illinois (and certain of its designated officials) on the ground that Transfer had not presented the court with an actual controversy.

Transfer operates a transportation service for 21 railroads having terminals in Chicago, transporting passengers and baggage from one terminal to another when a change of terminals is required. Transfer operates wholly within the city limits of Chicago. In operating as it does, Transfer furnishes a link in the interstate transportation of passengers and baggage and is, therefore, subject to regulation by the Interstate Commerce Commission.

Prior to contracting with Transfer for its transportation services, the railroads had utilized the services of another motor carrier, Parmelee Transportation Co. But, after the railroad engaged the services of Transfer, Chicago amended its municipal code, effecting a number of changes in its regulation of the type of services provided by Transfer. The most important change required Transfer to obtain a certificate of convenience and necessity from the Chicago Public Vehicle License Commissioner and the approval of the City Council before Transfer could legally transport passengers and baggage. Transfer refused to apply for a certificate, and Chicago threatened to arrest and fine Transfer's drivers if they drove unlicensed vehicles.

Transfer and the railroads sued in the federal district court to have the ordinance declared inapplicable to Transfer or invalid. The district court granted summary judgment against Transfer and the railroads. *Atchison, Topeka and Santa Fe Ry. Co.* v. *City of Chicago*, 136 F. Supp. 476 (N. D. Ill., 1955). This court reversed, holding that Transfer was an instrumentality of the railroads in interstate commerce and that its right to operate was subject to federal control under the commerce power. Chicago's attempted regulation was held to be unconstitutional, and Chicago could not prevent Transfer from operating in Chicago. *Atchison, Topeka & Santa Fe Ry. Co.* v. *City of Chicago*, 7 Cir., 240 F. 2d 930, 938 (1957).

The Supreme Court affirmed, holding that the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 1 *et seq.*, precluded Chicago from preventing the transfer service. *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 84-87 (1958).

Subsequently, Chicago amended its ordinance.[1] As amended, it requires operators of terminal vehicles, such

1. Chicago, Ill., Municipal Code § 28-1 *et. seq.*

as Transfer, to obtain licenses, provided the vehicles are in safe and proper condition; to demonstrate financial responsibility; to maintain its principal office in Chicago; to use drivers residing in Chicago; to have comfortable vehicles; to use a color on its vehicles which is satisfactory to the Commissioner; and to obey orders, rules, and regulations adopted or issued by the Commissioner.

The ordinance further gives either the Commissioner or the Mayor of Chicago discretion to revoke and suspend or deny licenses. The standards for such action are not expressed, and it is difficult to determine whether the ordinance, as written, provides for a hearing before revocation or denial of a license.

After the amendment of the ordinance, the Commissioner sent Transfer the following letter:

> "Please be advised that your company has not made application for the proper licenses for terminal vehicles operated by your company.
>
> "Please be further advised that unless your company complies with the provisions of the ordinance by Friday, September 22, 1961, you are hereby ordered by this office to cease and desist the operation of your vehicles until the ordinance of the City of Chicago has been fully complied with by your company."[2]

Transfer refused to apply for the licenses, instead filing suit for a declaratory judgment or injunction, alleging that Transfer was being discriminatorily required to pay a license or tax for the privilege of operating its vehicles and that the ordinance gave the Commission illegal discretionary power to recommend revocation of licenses.[3]

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2. Chicago now admits that it has no power to stop Transfer's operations in interstate commerce.

3. In 1960, prior to filing this case, Transfer applied for and received licenses for its vehicles from the Public Vehicle License Commissioner. Since then, Transfer has deposited the required license fees for 1961, 1962, and 1963 with the Clerk of the United States District Court.

The district court found, *inter alia*, the license fee charges to be a proper application of police powers and that since Chicago had taken no action under the ordinance, there was, as yet, no actual controversy between the parties. The trial court dismissed Transfer's complaint.

Transfer appealed. This court vacated the judgment below and remanded on the ground that, unknown to the trial court, the ordinance in question had been amended in two particulars prior to the dismissal. *Railroad Transfer Service, Inc.* v. *City of Chicago*, 334 F. 2d 991, 993 (1964).

On remand, the trial court found that the amendments of which it had not been previously aware did not affect its prior conclusions. Furthermore, one of the amendments had been rescinded in the interim, and the original reading of the ordinance had been restored prior to decision on remand. For the reasons that Chicago could validly tax and inspect Transfer's vehicles and that Chicago had taken no action detrimental to Transfer, the district court dismissed Transfer's second amended complaint. It is from this dismissal that Transfer has appealed.

Transfer argues that the trial court erred because the ordinance in question does not qualify as a permissible local safety regulation of interstate commerce. It contends that the ordinance bears little or no relationship to safety, but that it is an arbitrary effort by Chicago to regulate matters wholly unrelated to safety and to harass Transfer's operations. The ordinance, therefore, is claimed to constitute a serious impediment to interstate commerce.

Of course, if the Chicago ordinance can be said to conflict with federal regulatory measures so as to burden interstate commerce, or if federal regulation has preempted local regulation, then federal law must prevail. *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520, 529 (1959); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 87-88 (1958).

As written, however, the ordinance does not collide with federal preemption, nor has it been shown to conflict with existing federal regulations in any manner burdening commerce.

Since it is unquestioned that a state or locality may exercise police powers of regulation, if due process is accorded and they do not conflict with or unduly burden federal right, privilege, or authority, a case of this character would ordinarily turn on whether the Chicago ordinance is a regulation within legitimate police powers. However, that is a question which need not now be determined, since the ordinance is not offensive on its face, has not been applied, and has not been shown to have burdened interstate commerce.

Continental Baking Co. v. *Woodring*, 286 U. S. 352 (1932), is in point. There, at pages 367-69, the Supreme Court stated:

> "The objection to the authority given to the public service commission 'to regulate and supervise the accounts, schedules, service and method of operation,' 'to prescribe a uniform system and classification of accounts,' to require the filing of reports and data, and generally to 'supervise and regulate' all the carriers to which the Act applies 'in all matters affecting the relationship' between such carriers and 'the traveling and shipping public' * * * similarly raises no question which can now be considered, as there has been no action or threat of action, so far as appears, by the commission giving ground for the contention that the constitutional rights of the appellants have been or will be violated. * * * Whatever uncertainty may exist with respect to possible regulations of the commission will be resolved as regulations are promulgated. If any of these transcend constitutional limits, appellants will have their appropriate remedy. * * *
>
> "The duty laid upon the commission * * * to insist that motor vehicles shall be maintained 'in a safe and sanitary condition,' to prescribe qualifications of

operators as to age and hours of service, and to require the reporting of accidents, has manifest reference to considerations of safety. The terms of the statute do not require action by the commission which does not have reasonable relation to that purpose. In this respect, as well as in relation to the other matters above-mentioned, appellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration."

While the ultimate aim of the Chicago ordinance is not clear, the ordinance does have an apparent relation to responsibility. To require Transfer to maintain its offices in Chicago, to have its drivers reside in Chicago, and to give proof of financial responsibility is but to establish accessible responsibility. Such requirements are reasonably within police powers of promotion of welfare. Similarly, to require comfortable vehicles is not remote from welfare, and a requirement for approval of a color or color scheme may relate merely to convenience of identification. Finally, a requirement that Transfer obey the orders, rules, and regulations of the Commissioner may ultimately be nothing but a safety and responsibility requirement, once they are adopted and issued and their substance made apparent.[4]

To state these possibilities is not to assume their correctness nor to approve the ordinance: it is merely a demonstration that the ordinance is not obviously arbitrary nor clearly unrelated to the legitimate ends of the police powers of a locality.

While Chicago's ordinance is not, as Transfer would have it, inscrutable as a safety and welfare ordinance, it is true that its relation to safety is not in all respects self-evident. It is also true that the ordinance does not clearly

4. The Commissioner's first order to Transfer was that its employees be fingerprinted and examined by doctors. This was complied with.

provide for administrative standards or a hearing before termination of a license to operate on the streets of Chicago. What, however, is unprovided for in the language of the ordinance may yet be provided in the course of its application. We have no reason to assume that the application of the ordinance will not clarify its language in accordance with specific standards nor that a proper and just hearing will not be provided should the necessity arise. As it stands, the ordinance cannot be unequivocally classified and, until it is applied, it lacks the test whereby its real nature is revealed.

Transfer has not pleaded any injury and consequently has not shown any burden on interstate commerce. Transfer's apprehensions do not generate an actual controversy. If the ordinance is applied beyond constitutional limits, Transfer will have its appropriate remedy. *Continental Baking Co. v. Woodring, supra.*

The district court found jurisdiction to entertain Transfer's second amended complaint under 28 U. S. C. A. § 1337.[5] We agree.

In sum, prior to the commencement of this action in 1960, Transfer complied with the provisions of the ordinance in question by making the necessary application for its Chicago vehicle licenses and paid the required fee of $1630 for the year 1960. Thereafter, it paid into court the required license fees for 1961, 1962 and 1963.

Since the filing of this action, Transfer has carried on its terminal transfer operation without interruption or interference by Chicago or any of the individual defendants.

Chicago's authority to assess and collect its annual vehicle license fee has been established and the amount in question here is reasonable.

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5. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Chicago concedes that it now has no right to prevent the operation of Transfer's business.

Transfer operates wholly within the city limits of Chicago, has a complete monopoly and is without competition, except by licensed taxicabs.

The ordinance provisions concerning safety, comfort, drivers, color of vehicles and financial responsibility reasonably relate to welfare and safety and are clearly within the local police powers of Chicago and do not burden interstate commerce or conflict with federal regulatory powers.

There is no claim that the Commissioner or anyone else has issued any orders, rules or regulations in any way discriminating against Transfer.

There is no claim that Chicago or anyone else has applied the requirements of the ordinance in any manner to the detriment or harm of Transfer.

There is no claim that Chicago or anyone else has acted under the ordinance in any manner to deny Transfer due process.

Transfer's fears and apprehension of what may happen to it under the ordinance have not been translated into realities.

No actual controversy has been presented to the district court as required by 28 U. S. C. A. § 2201.[6]

For the foregoing reasons, we hold that the district court did not err in dismissing Transfer's second amended complaint. The judgment order appealed from is affirmed.

AFFIRMED.

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6. "*In a case of actual controversy* within its jurisdiction, • • • any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration • • •." (Emphasis added.)

No. 15230

SWYGERT, *Circuit Judge,* dissenting.

Unfortunately, I find myself unable to agree with the views expressed by Chief Judge Hastings and concurred in by Judge Castle.

The import of the court's holding is that no actual controversy exists until the ordinance is applied to Transfer. Yet it is abundantly clear from the record and the city's brief that Chicago intends to enforce the ordinance against Transfer eventually.[1] A somewhat analogous prematurity argument was made during the course of the earlier litigation between the parties. The contention was that federal courts should not undertake to adjudicate the validity of the provision requiring a determination of public convenience and necessity before the issuance of a license until efforts to obtain an appropriate state court adjudication had been exhausted. The Court rejected the argument. *Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U. S. 77, 84 (1958). More significantly, I think, the Court proceeded to dispose of the merits of the case despite the objection registered by Mr. Justice Harlan (Mr. Justice Frankfurter and Mr. Justice Burton joining in the dissent):

> Nevertheless, the validity of the ordinance should not be determined until Transfer has applied to Chicago for a "terminal" license and the local authorities have had an opportunity to act on the application. Not until then will it be known whether the ordinance, as it may be applied to Transfer's operations trespasses upon paramount federal concerns. *Id.* at 89.

Transfer is operating at the city's sufferance, without having obtained a license. Before a license can be obtained Transfer must comply with at least one of the questioned

1. For example, see the letter addresed to plaintiff by the Public Vehicle License Commissioner quoted in the majority opinion.

requirements of the ordinance, namely, proof that it is financially responsible. In *Atchison* the issue was whether the City of Chicago could withhold the issuance of a license to Transfer until it had first been determined that public convenience and necessity required additional interterminal service. I see no difference in essence between the requirement to obtain a determination of public convenience and necessity and the requirement that the plaintiff offer proof of its financial responsibility as a condition to the issuance of a license. In either event, the city is asserting a power to prevent an interstate operation, a power which it does not possess.

In *Atchison* the Court said:

> We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the city to permit interstate commerce to pass over those streets. Of course the City retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly the City may require registration of these vehicles and exact reasonable fees for their use of the local streets. *Id.* at 88.

In my opinion, not only the provision requiring proof of financial responsibility, but also the provisions which require that Transfer maintain its principal place of business in Chicago and that its drivers reside in that city have no relationship to the safety of plaintiff's operations. These provisions are neither general traffic regulations nor safety measures. They do not fall within the permissible area open to local regulation as delineated by the Supreme Court in *Atchison*.

I would reverse the order of dismissal.

EXTRACTS FROM CHAPTER 28, "PUBLIC PASSENGER VEHICLES," OF THE MUNICIPAL CODE OF CHICAGO.

Sec. 28-1 Definitions

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur. (1952, 1959, 1963.) (R. 21, 29, 35.)

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity. (1951, 1959, 1963.) (R. 21, 29, 34.)

"Cabman" means a person engaged in business as proprietor of one or more taxicabs. (1951, 1959, 1963.) (R. 21, 29, 35.)

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles (1951), livery vehicles, sight-seeing vehicles or terminal vehicles. (1959, 1963.) (R. 21, 29, 35.)

"Terminal vehicle" means a public passenger vehicle which is used exclusively by a coachman under contract with railroad or steamship carriers for the transfer of their passengers and hand baggage en route in interstate travel between railroad terminals and steamship docks pursuant to through route published tariffs. (1959.) (R. 29, 46.)

Sec. 28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers. (1952.) (R. 21.)

Sec. 28-4.1. No vehicle shall be licensed as a public passenger vehicle unles it has two doors on each side, and no vehicle having seating capacity for more than eight adult passengers shall be so licensed unless it has at least

two doors with fixed aisle space for access to said doors. (1959.) (R. 29.)

Sec. 28-5 Application. Applications for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant or, if applicant is a corporation, by its duly authorized agent, upon forms provided by the commissioner. . . . (1959.) (R. 30.)

Sec. 28-5.1 Qualifications. All corporate applicants for public passenger vehicle licenses shall be organized or qualified to do business under the law of Illinois and have their principal places of business in the city of Chicago. . . . (1959.) (R. 30.)

Sec. 28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. (1952.) If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed, and that the applicant is qualified to pursue the occupation of a cabman or coachman, the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued. (1959.) (R. 22, 29.)

Sec. 28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render

said vehicle unfit for public use, the license therefor shall be suspended by the commissioner until the vehicle shall be made safe for operation. . . . (1951.) (R. 25.)

Sec. 28-30.1. Every cabman, *corporation* and affiliate shall keep and provide accurate books and records of account of his operations at his place of business in the city. On or before May 1 of each year every cabman, *corporation* and affiliate shall file with the Commissioner a profit and loss statement for the preceding calendar year, showing all his earnings and expenditures for operation, maintenance and repair of property, depreciation expense, premium paid for workmen's compensation and public liability insurance, and taxes paid for unemployment insurance and social security, and all state and local license fees, property taxes and Federal income taxes, and a balance sheet taken at the close of said year.

The Commissioner, or the authorized committee of the Council, shall have access to the property, books, contracts, accounts and records during normal business hours at said place of business, for such information as may be required for the effective administration and enforcement of the provisions of this chapter, or for the adoption of any ordinances, rules or regulations affecting taxicab operations.

In addition to the foregoing reports, each cabman shall within thirty days after the six months' period ended December 31 and within thirty days after the six months' period ended June 30 of each year file a sworn statement with the Commissioner showing his gross fares collected and his operating expenses for the six months immediately preceding said dates.

(Part not italicized added in 1959, R. 30. Words italicized added in 1963. R. 44.)

SECTION 202—INTERSTATE COMMERCE ACT 49 U. S. C. 302.

Sec. 202. [*August 9, 1935, amended September 18, 1940, May 16, 1942.*] *49 U. S. C. § 302.*] (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.